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In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

JACINTO RODRIGUEZ-MORENO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. *The Actus Reus Elements of 18 U.S.C. 924(c)(1)*

Respondent does not take issue with our submission (U.S. Opening Br. 13-18) that venue for an offense is proper in a district where the defendant commits any *actus reus* element of the offense. To the contrary, he agrees (MS Br. 6)[1] that "[v]enue is determined by the acts of the accused that violate a statute, *i.e.*, the actus reus element of the offense." He contends, instead, that the only *actus reus* element of the offense defined by 18 U.S.C. 924(c)(1) is the use or carrying of a firearm. While he acknowledges (MS Br. 7) that the defendant's commission of a crime of violence or a drug trafficking

[1] As of the date of the filing of this reply brief, respondent's brief on the merits had not yet been printed. References to "MS Br." are to the typescript version of respondent's brief.

crime is an *element* of the Section 924(c)(1) offense, he contends that the defendant's commission of such a crime is not an *actus reus element* of that offense. Evidently, he believes that the commission of the related felony is merely a circumstance of the crime that can have no bearing on venue.

Respondent's argument is in error, for the commission of the "crime of violence or drug trafficking crime" is an *actus reus* element of the Section 924(c)(1) offense. "In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur." *United States* v. *Apfelbaum*, 445 U.S. 115, 131 (1980). Although the phrase "*actus reus*" does not have a universal meaning,[2] it generally conveys the principle that a criminal offense requires an element of action by the defendant. See *United States* v. *Shabani*, 513 U.S. 10, 16 (1994); see also 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* 272 (1986) (LaFave & Scott); Model Penal Code § 2.01(1); Oliver Wendell Holmes, *The Common Law* 54 (1881).

The elements of a crime may *also* require proof of external circumstances that bring the act within the reach of the statute. Such circumstances, however, are

[2] The phrase appears to derive from the maxim "actus non facit reum, nisi mens sit rea," which can be translated as "the act itself does not make a man guilty, unless his intention be so." John M. Cottrell, *A Collection of Latin Maxims and Phrases* 9 (1897). While the literal meaning of "*actus reus*" is a "bad act," in technical legal use it generally refers to the defendant's voluntary conduct (and sometimes the conduct's results) as distinguished from the mental element of the crime. See generally 1 *Encyclopedia of Crime and Justice* 15 (Sanford H. Kadish et al., eds., 1983). While the underlying concept may have common law origins, "[t]he term 'actus reus' apparently was not used by scholars in criminal law treatises prior to the twentieth century." Joshua Dressler, *Understanding Criminal Law* 63 (1987).

distinguishable from the *actus reus* itself. In the federal system, for example, a crime may require proof of jurisdictional facts, which do not, strictly speaking, form part of either the act or the intent. In addition, a crime may require proof of circumstances that influenced the character of the act but are not the act itself. A charge of perjury, for example, requires proof that the witness had been previously sworn, but the act is the uttering of the falsehood. See generally 1 LaFave & Scott, *supra*, at 273.[3]

In contrast to an element of the crime that describes its external circumstances, the *actus reus* is usefully understood as the specific voluntary act or acts that the defendant performs (or for which the defendant is legally responsible) and that constitutes the conduct targeted for criminal punishment. Cf. *Powell* v. *Texas*, 392 U.S. 514, 533 (1968) (plurality opinion) (interpreting *Robinson* v. *California*, 370 U.S. 660 (1962), to mean that "criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing,

[3] Some commentators suggest that the "*actus reus*" should be understood to include all of the external circumstances and results of the defendant's action, *i.e.*, everything but the *mens rea* itself. See, *e.g.*, Glanville Williams, *Criminal Law: The General Part* 18-21 (2d ed. 1961); but see *id.* at 21 (acknowledging as an "exceptional" case that an aspect of a crime may be viewed as a "condition of offence though not part of it"). That approach may usefully isolate the intent requirement of the criminal law, but "[a] definition of act which encompasses circumstances and consequences, on the other hand, presents a serious problem in determining the termination point of one's acts, and also poses serious analytical difficulties in discussing 'voluntary' acts." 1 LaFave & Scott, *supra*, at 273. The Model Penal Code therefore distinguishes among conduct, an accompanying mental state, and attendant circumstances or results. See Model Penal Code § 1.13.

or perhaps in historical common law terms, has committed some *actus reus*"). That approach to the *actus reus*, which focuses on the acts voluntarily done by the defendant (and distinguishes them from external conditions of the offense), is best suited for applying the Constitution's venue provisions, which call for courts to determine the place (or places) where the defendant's crime "shall have been committed." U.S. Const. Art. III, § 2, Cl. 3; Amend. VI.[4] By requiring crimes to be prosecuted in the State where they were committed, rather than in (for example) the State of which defendant is a citizen, the Framers recognized that there is no unfairness in bringing someone to justice where he has chosen to perform an act constituting an offense. By voluntarily performing an act that society has interest in prohibiting, the defendant subjects himself to the risk of prosecution where that act is done. Cf. Model Penal Code and Commentaries § 2.01, cmt. 1, at 215 (1986) (requirement of voluntary act "focuses upon the conduct that is within the control of the actor"); Holmes, *supra*, at 54 (explaining that "[t]he reason for requiring an act is, that an act implies a choice, and that it is felt to be impolitic and unjust to

[4] As we explain below (pp. 5-6, *infra*), that approach to the *actus reus* also informs the Court's decision in *United States* v. *Cabrales*, 118 S. Ct. 1772 (1998), and explains why *Cabrales* does not control this case. We note as well that neither this case nor *Cabrales* involves a situation in which venue was based on the district in which the *results* of the defendant's acts were felt or intended to be felt. Cf. 18 U.S.C. 1512(h) (authorizing venue for witness tampering or obstruction of justice prosecution "in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred").

make a man answerable for harm, unless he might have chosen otherwise").

In the case of Section 924(c)(1), a defendant must choose to commit *two* acts in order to be subject to punishment: he must commit a crime of violence or drug trafficking crime (which is to say, he must commit all the acts necessary for punishment for that offense) *and* he must use or carry a gun during and in relation to that crime. It is not sufficient if the defendant merely uses or carries a gun; if he chooses not to undertake a crime of violence or drug trafficking offense, then he does not violate Section 924(c)(1). Conversely, if the defendant chooses to kidnap a victim but never uses or carries a gun during and in relation to that activity, then no Section 924(c)(1) offense has been committed. Section 924(c)(1) punishes only one who chooses to commit a serious crime *and* chooses to use or carry a gun during and in relation to that crime. See U.S. Opening Br. 22-23; 114 Cong. Rec. 22,231 (1968) (Rep. Poff, explaining that the statute was intended "to persuade the man who is tempted to commit a Federal felony to leave his gun at home").

That characteristic of Section 924(c)(1) explains why respondent's reliance on *United States* v. *Cabrales*, 118 S. Ct. 1772 (1998), is misplaced (see MS Br. 15-17). In *Cabrales*, the Court held that venue on charges of money laundering was not proper in the district where the unlawful proceeds were unlawfully generated, when the financial transactions prohibited by the statutes occurred in another district. The Court emphasized that the relevant statutes prohibit only the financial transactions themselves, and not the anterior criminal conduct that generate the proceeds to be laundered. 118 S. Ct. at 1776. In other words, the *actus reus* of the money laundering offense is the conduct of the financial trans-

actions. While the existence of the criminal proceeds is an essential element of the crime—a circumstance of the crime—that the government is required to prove to obtain a conviction on money laundering (*ibid.*), the generation of those proceeds is not part of the *actus reus* of money laundering, because it is not an act that must be performed by the launderer (or anyone for whose conduct the launderer is responsible). Thus, to commit the crime of money laundering, Cabrales was required only to choose to undertake certain financial transactions; she was not required also to choose to undertake the criminal activity that generated the proceeds that were laundered in those transactions. By contrast, to convict respondent for violating Section 924(c)(1), the government was required to prove both that he chose to undertake the kidnapping of Mr. Avendano, and that he used or carried a gun during and in relation to that kidnapping.

Respondent erroneously contends (MS Br. 11-13) that the conclusion that Section 924(c)(1) has more than one *actus reus* reads the element of "during" out of that statute. There is no dispute that the use of the gun must be temporally connected to the crime of violence that it facilitates; as respondent notes (MS Br. 12), if the defendant uses a gun in one State and thereafter begins a crime of violence in another State, the two acts may not be sufficiently contemporaneous to satisfy the "during" element. In this case, however, respondent began the kidnapping of Mr. Avendano in Texas, continued it into New Jersey, and then continued it further into Maryland, where he used the gun. The kidnapping was still continuing in Maryland when the gun was used; accordingly, the gun use did occur during the crime of violence. Because respondent chose to commit one *actus reus* element of Section 924(c)(1), the crime of violence, in New Jersey as well as in Maryland, and because he used the firearm during and in relation to that crime of violence, venue for the Section 924(c)(1) offense was proper in New Jersey.

Respondent also argues that venue in New Jersey is improper because his use of the gun did not occur during "the New Jersey crime." MS Br. 12; see also *ibid.* (arguing that the "New Jersey kidnapping" is not an essential element of the Section 924(c)(1) violation charged in this case); *id.* at 17 ("[T]he fact that there was a kidnapping in New Jersey previous to the gun being used, did not in anyway [*sic*] establish that the gun was used during a kidnapping that occurred in New Jersey."). The fundamental flaw in that argument is that the "crime of violence" in the Section 924(c)(1) count on which respondent was convicted—the single, continuous kidnapping of Mr. Avendano—was a unitary crime. See *United States* v. *Seals*, 130 F.3d 451, 461-462 (D.C. Cir. 1997) (agreeing with courts that have held that crime of kidnapping continues "while the victim remains held and a ransom sought"), cert. denied, 118 S. Ct. 2323 (1998); *United States* v. *Denny-Shaffer*, 2 F.3d 999, 1018-1019 (10th Cir. 1993); *United States* v. *Garcia*, 854 F.2d 340, 343-344 (9th Cir. 1988), cert. denied, 490 U.S. 1094 (1989); see also *United States* v. *Godinez*, 998 F.2d 471, 473 (7th Cir. 1993) (agreeing with defendant that "a kidnapping does not end until the victim is free; * * * one kidnapping is a single crime, rather than, say, one crime per hour of detention"). The fact that the kidnapping spanned several States does not mean that it can be geographically divided into multiple crimes called "the New Jersey kidnapping," "the Maryland kidnapping," and so forth. Rather, the evidence established, and the jury found, that respondent's use of the gun occurred "during and in relation to" the

charged kidnapping, which was committed in part in New Jersey and in part in Maryland. Respondent cannot defeat venue by seeking to create a discrete crime of violence consisting only of the kidnapping acts that took place in New Jersey.[5]

2. *Discrete versus Continuing Offense*

In arguing that venue on the Section 924(c)(1) charge would be proper only in Maryland, respondent and his *amicus* contend that that charge could not be prosecuted in New Jersey because (they argue) the charge is a "point-in-time" offense, not a "continuing" offense for which, under 18 U.S.C. 3237(a), venue would be proper in any district where the offense was begun, continued, or completed. See MS Br. 13-14; NACDL Amicus Br. 10-11. That argument is incorrect. The crime of violence element of Section 924(c)(1) in this case, the kidnapping, was "committed in more than one district." 18 U.S.C. 3237(a). Because that kidnapping was an element of respondent's violation of Section 924(c)(1), his violation in this case was also "committed in more than one district," and may be prosecuted "in any district in which such offense was begun, continued, or completed," including New Jersey. *Ibid.*

At the core of respondent's argument is the contention (MS Br. 30) that "18 U.S.C. § 924 was enacted with the sole focus of prohibiting and punishing the

[5] Indeed, if respondent were correct that the kidnapping offense could be subdivided into multiple geographical crimes, he should have moved for a judgment of acquittal on the ground that the evidence did not establish that his use of the gun was "during * * * the New Jersey crime." Respondent, however, made no such argument, and there is no support for the view that a kidnapping may be divided into as many units of prosecution as the number of States in which it took place.

illegal use of weapons. There is no focus, central or otherwise, on the underlying crimes." That characterization of Section 924(c)(1) is demonstrably incorrect. As the D.C. Circuit has explained, in enacting Section 924(c)(1), "Congress was focusing on the defendant's employment of a gun for the purpose of bringing about the crime [of violence or drug trafficking crime]. In other words, the statute criminalizes the defendant's advancement of his criminal ends by means of a gun, whether carried or deployed in some more active manner." *United States* v. *Anderson*, 59 F.3d 1323, 1326 (D.C. Cir.) (en banc) (emphasis omitted), cert. denied, 516 U.S. 999 (1995); see also *Muscarello* v. *United States*, 118 S. Ct. 1911, 1916 (1998) (noting statute's concern about the "dangerous combination" of "drugs and guns"); *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.) (observing that "the evident purpose of the statute was to impose more severe sanctions where firearms facilitated * * * the commission of [another federal] felony"), cert. denied, 484 U.S. 867 (1987); U.S. Opening Br. 21-25 (tracing development of Section 924(c)(1)).

As Judge Alito observed in dissent below, respondent's characterization of Section 924(c)(1) is difficult to square with the fact that eight of the nine courts of appeals that have considered the issue have held that "only one § 924(c)(1) violation can be appended to any single predicate crime." Pet. App. 50a (collecting cases). If a discrete *use* of the firearm were the entire essence of the offense, those courts logically should have held that every single use of a gun in the context of a crime of violence would be a separate offense. But the courts that have rejected that argument have concluded instead that "the draftsmen were not employing the word 'uses' to imply that each discrete

act that might be called a 'use' constitutes a separate crime." *Anderson*, 59 F.3d at 1326-1327. Rather, the drafters meant that "if during the course of a crime a defendant uses [or carries] a firearm at any time, he commits a separate crime." *Ibid.* (emphasis omitted) And because the crime of violence here (the kidnapping) is clearly a continuing offense, the Section 924(c)(1) offense committed by respondent—namely, committing the kidnapping *and* using a gun during that kidnapping—is a continuing offense as well.

3. *The Court of Appeals' Verb Test*

As we explained in our opening brief (at 24-27), the court of appeals' rigid "verb test," under which venue is entirely dependent on the verb used by Congress in defining a statutory offense (see Pet. App. 14a-15a), should be rejected because, in some circumstances, it can make venue dependent on immaterial portions and aspects of the statutory language rather than on the true nature of the offense defined by the statute. Respondent does little to rebut that showing. In particular, he fails to address our point (U.S. Opening Br. 26) that Congress could have redrafted Section 924(c)(1) to convert other parts of speech into verbs even while retaining the identical meaning of the statute—which under the verb test would lead to a different venue result for a substantively identical statute. The Constitution's venue provisions should not turn on such irrelevant distinctions.

Respondent points out (MS Br. 19-21) that several courts and commentators have endorsed the verb test as, at least, a starting point for identifying the proper venue for an offense (unlike the court of appeals, which treated the verb test as the sole inquiry, see Pet. App. 14a). But our argument is not that the verb in a statute

is irrelevant to venue; rather, it is that other aspects of a statute, including other parts of speech and the nature of the offense defined by the act, are relevant as well. Thus, this Court has *not* held that venue depends solely on the verb in the statute defining an offense; rather, it has held that venue depends on "the nature of the crime alleged and the location of the act or acts constituting it." *Cabrales*, 118 S. Ct. at 1776.[6] Indeed, one of the sources on which respondent relies (see MS Br. 19) does not endorse a strict reliance on the verb in a statute, but rather describes venue as dependent on "the verbs, key terms, and policies underlying the statute defining the crime." 25 *Moore's Federal Practice* § 618.05[3][a] (Daniel R. Coquillette et al., eds., 3d ed. 1998). That is a more realistic approach consistent with our position in this case.

While the verb in a sentence may in some cases be sufficient to describe the nature of the crime for venue purposes, in others it may not.[7] In this case, the nature

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[6] Respondent himself provides an example. He argues that in *Travis* v. *United States*, 364 U.S. 631 (1961), the Court relied on the statutory phrase "on file with the Board" in concluding that the statute penalized the act of having a false statement at a particular place (with the National Labor Relations Board in Washington, D.C.). See MS Br. 17 n.12. "[O]n file with the Board," however, is a prepositional phrase, not a verb; even under respondent's reading of the case, therefore, *Travis* undermines his argument, because it shows that this Court has looked to parts of speech other than verbs to determine the *actus reus* of an offense.

[7] See, *e.g.*, *United States* v. *Billups*, 692 F.2d 320, 332 (4th Cir. 1982), cert. denied, 464 U.S. 820 (1983). In that case, the court of appeals rejected the verb test to determine venue for a prosecution under 29 U.S.C. 186(b)(1), which makes it unlawful for any union official to "request, demand, receive, or accept, or agree to receive or accept" a payment from an employer. The court found venue to be proper in Virginia (where the employer and union

of the crime includes both the element of using of the firearm (which is expressed by a verb) and the element of the commission of a crime of violence, during and in relation to which the firearm is used (which is expressed by a prepositional phrase). The true nature of the offense is not expressed by the verb alone.

4. *Venue Policies and Practical Considerations*

Respondent emphasizes (MS Br. 22-24) that the Constitution's venue provisions are intended for the benefit of the defendant, and in particular, are intended to prevent the government from prosecuting someone far from his home.[8] It is nonetheless true that venue does not turn on the residence of the accused; under the Constitution's venue provisions, a criminal defendant may always be prosecuted in the State where his offense was committed, whether or not that State is his place of residence. See *United States* v. *Anderson*, 328 U.S. 699, 705 ("[T]he geography prescribed is the district or districts within which the offense is committed. This may or may not be the place where the defendant resides."). As we have explained (p. 4, *supra*), the Framers found no unfairness in bringing someone to justice in a place where he has chosen to commit a crime, and they did not require the authorities located in a particular jurisdiction where a crime is committed

were located) and rejected the defendant's argument that, under the verb test, venue was proper only in New York, where the payment had been accepted. "[T]here are crimes where the situs is not so simple of definition. So it is here—we cannot so easily garner and apply to the statute involved all of the rationale of Article III, the sixth amendment and Rule 18 from one single verb." 692 F.2d at 332.

[8] That argument does respondent little good in any event, for he spent barely a day in Maryland, which he contends is the only proper venue for this prosecution.

to go far afield to prosecute those who are responsible. Because respondent chose to commit some of the acts constituting the *actus reus* of Section 924(c)(1) in New Jersey and some in Maryland, he exposed himself to the risk of prosecution under that statute in both States, and he cannot claim unfairness in that he was brought to justice in one State rather than another.

Respondent argues that the government would suffer no appreciable burden if venue on the Section 924(c)(1) offense were held to be proper only in Maryland. He maintains that the government could prosecute him in two separate trials—one in New Jersey on the charge of kidnapping Mr. Avendano and one in Maryland on the Section 924(c)(1) charge—or that it could prosecute both charges in Maryland. MS. Br. 25-26. As we have pointed out, however (U.S. Opening Br. 30-31), both courses impose serious costs on the government and the judicial system. Two trials would require the government to marshal the same evidence twice, because even if the government secured a conviction against respondent in New Jersey on the kidnapping, it would have to prove the kidnapping again in the Maryland trial to show that respondent had committed the "crime of violence" element of Section 924(c)(1).[9] On the other hand, moving both prosecutions to Maryland would entail similar costs, for that course would require the government either to bring a separate prosecution against respondent and his co-defendants

[9] Moreover, as the court of appeals pointed out (Pet. App. 27a), the botched drug transaction provided the motive for the kidnapping. Thus, if the government had to prove the kidnapping against respondent a second time it would have to prove the drug activities as well. Much or all of this multi-week trial would have to be repeated.

for the kidnapping of Mrs. Avendano (since that offense was committed in New Jersey, not in Maryland), or to drop that charge altogether.

Respondent also argues (MS Br. 26-28) that dropping the Section 924(c)(1) charge entirely would cause the government little prejudice because, under the Sentencing Guidelines, his use of the firearm could be taken into consideration in establishing his sentence. The Sentencing Guidelines do permit an upward adjustment of the defendant's offense level to reflect the use of a firearm during an offense. See Guidelines § 2A4.1(b)(3) (1997); U.S. Opening Br. 32. That adjustment, however, is not a substitute for the mandatory five-year consecutive sentence that Congress required under Section 924(c)(1).[10] Indeed, Congress considered the mandatory prison term under Section 924(c)(1) to be so important that it made that statute applicable even when the defendant was also charged with another federal offense containing its own sentence-enhancement provision for use of a firearm. See S. Rep. No. 225, 98th Cong., 1st Sess. 312-313 (1983) (explaining that amendment would overturn the effect of this Court's decisions in *Simpson* v. *United States*, 435 U.S. 6 (1978) and *Busic* v. *United States*, 446 U.S. 398 (1980)); U.S. Opening Br. 23. Abandoning Section 924(c)(1) charges in cases like this would run directly counter to the congressional policy behind Section 924(c)(1).

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[10] Respondent's offense level under the Sentencing Guidelines, without any adjustment for use of a firearm, was 27, which translates to a sentencing range of 87 to 108 months' imprisonment. See Sentencing Tr. 67. With a two-point upward adjustment to 29 for use of a firearm, his sentencing range would be 108 to 135 months' imprisonment. See Guidelines Ch. 5, Pt. A (sentencing table)

* * * * *

For the foregoing reasons, and for those set forth in our opening brief, the judgment of the court of appeals, reversing respondent's conviction under 18 U.S.C. 924(c)(1), should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

OCTOBER 1998